

for each offense. That, for some purposes, sentences upon several counts charging distinct offenses are separate sentences is evident from the fact that error in the sentence imposed on one count does not affect the sentence imposed on others. See *In re Greenwald*, 77 F. 590, 594 (C. C. Cal.); *United States v. Carpenter*, 151 F. 214 (C. C. A. 9), 9 L. R. A. (N. S.) 1043, 10 Ann. Cas. 509; *De Jianne v. United States*, 282 F. 737, 742 (C. C. A. 3); *Blitz v. United States*, 153 U. S. 306, 14 S. Ct. 924, 38 L. Ed. 725; *People v. Holton*, 326 Ill. 481, 158 N. E. 134. That, for other purposes and under other statutes, successive sentences may be cumulated and treated as a single sentence or single term of imprisonment, as in *United States v. Thompson*, 202 F. 346 (D. C. Cal.), and *Ebeling v. Biddle*, 291 F. 567 (C. C. A. 8), need cast no doubt upon our conclusion. Within the meaning of section 19 of the Act of February 5, 1917, the relator was sentenced more than once.

The judgment is reversed, and the cause remanded with directions to discharge the writ.

JOCKMUS v. LEVITON et al.

Circuit Court of Appeals, Second Circuit.
October 29, 1928.

No. 157.

1. Patents \S 68—Catalogue distributed generally to trade is publication of invention as regards subsequent patent (35 USCA \S 31).

Catalogue distributed generally to the trade is publication of invention or discovery, under Rev. St. \S 4886 (35 USCA \S 31), rendering subsequent patent invalid.

2. Patents \S 328—1,114,299, claims 1 and 2, for electric light fixtures imitating lighted candle, if valid, held not infringed.

Severus patent, No. 1,114,299, claims 1 and 2, for electric light fixtures made to imitate lighted candle, if valid, held not infringed, in view of narrow scope required by previous state of art.

Appeal from the District Court of the United States for the Eastern District of New York.

Patent infringement suit by Charles H. Jockmus against Eysor Leviton and Isadore Leviton, trading under the name of the Leviton Manufacturing Company. Decree for plaintiff, and defendants appeal. Reversed, and bill dismissed.

The patented invention relates to electric light fixtures made to imitate a lighted can-

dle, an electric bulb being the flame, and a fiber or porcelain jacket, the candle. The bulb is set in a socket which must be in some way supported upon the end of the wiring pipe, which simulates a candlestick. As the length of the porcelain jackets varies, it is necessary to make the support adjustable in length and this the patent provides. It consists of two vertical sliding legs, the lower being turned at the bottom at right angles, and fitted with a threaded collar or sleeve, which fits upon the end of the wiring pipe. The upper leg is likewise turned at right angles, the horizontal part having a threaded opening, into which the socket can be screwed by a projecting stud. The two legs which are in alignment slide vertically over each other and are held in relative position by a threaded bolt. After the socket has been set in place, and the lower sleeve screwed into the pipe, the legs are fixed at the proper distance. The wires can then be adjusted to terminals upon the socket and the jacket placed over the whole.

The claims in suit are:

"1. An electric light fixture, comprising a pipe terminal, an incandescent lamp-socket, an extensible support between the socket and said pipe terminal, and a jacket around said support, said support comprising a pair of bars at one side of the jacket slidably and adjustably connected to each other at one end and bent inwardly at the other, said inwardly bent ends being provided with a screw-thread for connection to the pipe terminal and to the socket respectively.

"2. An electric-light fixture comprising a pipe terminal, an incandescent lamp-socket, a pair of conductors leading from the terminal to the socket, a stud in said socket at the lower end thereof, an extensible support comprising a pair of bars each provided with a screw-thread for connection to the pipe-terminal and to the stud on the socket respectively, said bars being offset intermediate their points of connection to the pipe-terminal and to the sockets respectively to permit the conductors from the terminal to align with the socket and to be readily adjusted without interference by said support, and a jacket around said support."

In his original application Severus claimed broadly and extensible support between the socket and the pipe terminal, and more specifically such a support composed of sliding legs. These claims were rejected on a patent to one Bonnell, 825,182, which showed a similar support by means of concentric cylinders, through which the wires must pass and be fished out at the top.

Thereupon he amended by limiting his broadest claim to a pair of bars at one side of the jacket. In this form it was again rejected upon a British patent to the same Bonnella, which showed two sets of sliding bars as a support, being themselves the conductors. He thereupon struck out all his claims and put in those which were allowed, and which, as their perusal will show, were very literally confined to the actual disclosure.

The defendant's supposed infringements are in two forms: One with a single, and the other with a double, support, each support consisting of a pair of vertically adjustable sliding legs, of which the upper is not bent horizontally at its top to receive the stud, nor offset at its point of connection. On the contrary, its top lies in a vertical groove at the side of the socket, where it is held by a horizontal threaded bolt passing through to the other side.

The only prior art which it is necessary to describe is the printed catalogue of a German manufacturer found on file in the Patent Office at a date considerably later than the filing of the application. This was in French and intended only for the French trade; it was dated in 1908 and contained the price list of various Edison sockets with cuts of the articles for sale. On one page were several cuts of candle sockets and of the jackets to surround them. One of these, No. 712, which was described in the text as a candle socket with porcelain base adjustable in height from 100 to 130 millimeters, portrayed a socket support similar in all ways to the patented disclosure except for the particular details upon which the claims were granted. It disclosed a socket, with a single support in two parts, slidably connected, one leg to hold the socket, and the other to fit about the pipe terminal by means of a threaded collar or sleeve.

In order to prove that this had been published before the date of the application, May 27, 1912, the defendants called one Schmidt, a member of an extinct German firm, Gogarten & Schmidt, which had issued the catalogue, who testified that it had been printed in the year of which it bears date, and had been at that time sent out to the customers of the firm either by its representatives or by mail. At first about 50 were issued, then about 100 and finally in all more than 1,000. The firm received orders and sold goods through its catalogues, and though he could remember no specific customers and no particular mailing, he was positive that this one had been so used. One Scharpe corroborated Schmidt. He had been

employed by the firm during the year 1908 and made up customers' lists, to all of whom he sent out the catalogue of 1908, as well as a later one in 1910-11. He, too, could give no details. The catalogue of 1910-11 contained one of the 1908 candle sockets, but omitted that in question here and added two others.

The District Judge held that the catalogue was not sufficiently proved to constitute a prior use, that the other prior art was irrelevant, and that the defendant infringed.

Gifford & Scull, of New York City (George F. Scull, of New York City, of counsel), for appellants.

Howson & Howson, of New York City (Hubert Howson and Wm. S. Pritchard, both of New York City, of counsel), for appellee.

Before MANTON, L. HAND, and AUGUSTUS N. HAND, Circuit Judges.

L. HAND, Circuit Judge (after stating the facts as above). [1, 2] We are content to follow the ruling in *Imperial Glass Co. v. Heisey*, 294 F. 267 (C. C. A. 6), that a catalogue distributed generally to a trade is a publication within Revised Statutes § 4886, 35 USCA § 31. It may indeed be that such a document was not a "public work" under the act of 1836 (5 Stat. 117), and that *Parsons v. Colgate* (C. C.) 15 F. 600, was rightly decided, though the brief comment in the opinion does not take the distinction. *Reeves v. Keystone Bridge Co.*, 20 Fed. Cas. 466, No. 11,660, only threw out a doubt, and went off on another point. While it was laid down without discussion in *New Process Fermentation Co. v. Koch* (C. C.) 21 F. 580, 587, that circulars were not publications, it was unnecessary to the decision and certainly was not its chief reliance. *Britton v. White Mfg. Co.* (C. C.) 61 F. 93, was decided without discussion, and on the authority of the three cases, just cited, which support it only so far as we have said. The aggregate of these authorities is not so imposing as to cause us any hesitation in following the Sixth Circuit. On principle we are entirely in accord, for the purpose of the statute is apparent, and we ought to effect it so far as its language will allow. While it is true that the phrase, "printed publication," presupposes enough currency to make the work part of the possessions of the art, it demands no more. A single copy in a library, though more permanent, is far less fitted to inform the craft than a catalogue freely circulated, however ephemeral its existence; for the catalogue goes direct to those whose interests make them like-

ly to observe and remember whatever it may contain that is new and useful.

Whether the cut, No. 712, in Gogarten & Schmidt's 1908 catalogue, was a sufficient disclosure is another matter. If the claims be strictly limited, it certainly was not, because it did not show how the end of the upper leg was fastened to the stud—whether as the plaintiff does it, or as the defendant, or in some other way. But, if the claims be read as they must be to cover the supposed infringement, we do not see what can be thought missing. That it was an adjustable candle socket the text itself declares; how its adjustment was to be made the cut makes plain beyond chance of mistake. The socket at the top is plainly for a bulb and the screw thread at the bottom to fit upon the pipe terminal. The jacket was represented by figures 713 and 714, and the whole of this very simple invention was before the reader at a glance. We know of no rule that figures can never of themselves be an adequate anticipation of mechanical inventions, as of course they must be of designs, and we can see no reason for importing into the statute an arbitrary distinction, unrelated to its purposes, *Keene v. New Idea Spreader Co.*, 231 F. 701, 708 (C. C. A. 6); *Huebner v. Mathews*, 253 F. 435, 444 (C. C. A. 6). Words have their equivocations quite as much as figures; the question always must be what the art necessarily gathered from what appeared.

Whether the catalogue was in fact distributed generally, and when, are different questions. That it was printed in 1908 no one can reasonably doubt; it was a trade catalogue, meant to pass current for a season and to be superseded, as its successor of 1910 in this very case bears witness. To suppose that it bore an earlier date than that at which it first appeared contradicts all we know about merchandising; it might be post-dated like a motor car, but never the opposite. It is of course conceivable that, though printed, it was never distributed, or that the distribution was too limited to be a "publication." As to the last we can scarcely undertake to set a limit. Schmidt says that perhaps 1,000 went out. Far less would have served; the 50 which was his lower limit were quite enough. To be sure the fact of any distribution at all rests upon the uncorroborated testimony of him and Scharpe, because there was further documentary corroboration of neither, though each was explicit in his recollection, and each had had first hand knowledge. This would not be enough, if the catalogue itself were not produced, bearing its own evidence of existence since 1908, but no

one can seriously suppose that such a document, printed in quantity, was intended to be kept secret; its whole purpose was to be spread broadcast as far as possible. It had been printed at some expense in French for French customers, and, unless some accident happened to prevent, it would in due course have gone upon its intended errand. To prove that no accident did happen, and that it did reach its destination we have, it is true, only oral, though entirely disinterested, testimony; but it is a mistake to assume that, even under the extraordinarily severe tests applied to the proof of anticipation, every step must be buttressed by documents. That some documents are necessary, perhaps, may be the rule; but, when the documents go so far as here, the ritual, if there is any, is satisfied, and the question is merely whether any doubt remains. We think that to entertain a scruple in a case so fortified is to catch at straws.

This found, we need go no further. The claims must be limited to their language to escape defeat, even if they were not so limited by what took place in the Patent Office. That they are invalid we do not say; but they are very narrow, as narrow as the applicant chose to make them to avoid the Examiner's references, who happened to be building better than he knew.

Decree reversed, and bill dismissed, for noninfringement.

HOOKLESS FASTENER CO. v. H. L. ROGERS CO., Inc.

Circuit Court of Appeals, Second Circuit.
October 29, 1928.

No. 121.

1. Patents \Leftrightarrow 16—Commercial success of patented device is immaterial, where patent is invalid.

Commercial success of patented device is immaterial, where patent is invalid for lack of invention.

2. Patents \Leftrightarrow 328—1,322,650, claims 4, 5, 13, 20, for fastener for slit and other closures, held void.

Sundback patent, No. 1,322,650, claims 4, 5, 13, 20, for fastener for slit and other closures, held void for want of patentable novelty.

Appeal from the District Court of the United States for the Southern District of New York; Francis A. Winslow, Judge.

Patent infringement suit by the Hookless Fastener Company against the H. L. Rogers Company, Inc. Decree for plaintiff [26 F.